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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 677

DAVE LEE DOVER,

Petitioner,

vs.

THE STATE OF NORTH CAROLINA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND BRIEF IN SUPPORT THEREOF.

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Summary

Your petitioner, Dave Dover, petitions this Honorable Court for a writ of certiorari to the Supreme Court of North Carolina, and would respectfully show:

That your petitioner was indicted in the Superior Court of Gaston County, North Carolina, under a bill of indictment which appears in the record at page 2, charging that your petitioner, David Lee Dover, did unlawfully and wilfully have and keep in his possession spirituous and intoxicating liquors for the purpose of sale against the form of statutes in such cases made and provided, and in a second count that the said Dave Lee Dover did unlaw-

fully and wilfully have and keep in his possession spirituous and intoxicating liquors against the form of the statute in such cases made and provided.

That the bill of indictment did not charge the quantity of whiskey in possession and that your petitioner, therefore, contended that the same was void since under the North Carolina law (See Appendix 7) your petitioner was entitled to have and to transport a quantity of whiskey upon which either the Federal or the State tax had been paid. The evidence disclosed, RP 8 and 9, that your petitioner had in his automobile exactly one gallon of whiskey upon which the Federal tax had been paid. Your petitioner further contended in his oral motion for judgment as of non suit that he not only was entitled to have in his possession whiskey not in excess of one gallon under Amendment 21 of the United States Constitution (See Appendix 3, Pages 15-16), but that he was also entitled under Chapter 49, Public Laws of North Carolina, 1937 (See Appendix 7, Pages 16-17) to have in his possession a quantity of whiskey not in excess of one gallon, and the bill of indictment failing to charge that he had a quantity of whiskey in excess of one gallon, charged no crime; that the evidence offered by the State did not establish that he had whiskey in excess of one gallon and that, therefore, there was no violation of any law, and that failure of the Court to allow his judgment as of non suit was a violation of the Due Process Clause of the United States Constitution, Amendments 5 and 14 (See Appendix 1 and 2, Page 15). Your petitioner likewise contended in his oral motion for judgment as of non suit that the trail court in its instructions to the jury in Assignment of Error No. 8, RP 22, and Assignment of Error No. 9, RP 23, and Assignment of Error No. 11, RP 24, wherein the court charged the jury that the possession of any quantity of whiskey

was prima facie evidence that such possession was unlawful and in violation of the Statute, and that such possession was prima facie evidence that it was possessed for the purpose of sale invaded Interstate Commerce Clause Article 1, Section 8, Clause 3 (See Appendix 6, Page 16); that the State of North Carolina had, by Chapter 49, Public Laws of 1937, adopted a method of control for the said state and that your petitioner was within his legal rights in possessing not in excess of one gallon of tax paid whiskey, both under the Federal law and under the State law; that upon the Court's instruction that possession of any quantity of whiskey was in violation of the law, the jury returned a verdict of guilty, and that thereupon the court imposed judgment on the first count of eighteen months on the roads of the state with said sentence being suspended upon condition that your petitioner pay a fine of $500.00 and that he remain of good behavior for a period of three years; that on the second count there was a road sentence of eighteen months imposed with the same being suspended upon condition that your petitioner be of good behavior for a period of three years; that upon the imposition of said sentences your petitioner attempted to appeal to the Supreme Court of North Carolina; that said appeal was denied on November 23, 1949, and that a petition for reinstatement of the appeal was denied on December 14, 1949.

Your petitioner contended in his oral motion for judgment as of non-suit that the Due Process Clause of the United States Constitution had been denied him in the following particulars:

(a) That the bill of indictment did not charge a crime, since it did not charge the possession of more than one gallon of intoxicating liquor.

(b) That the Due Process Clause had been violated for the reason that the evidence did not disclose that your petitioner possessed more than one gallon of whiskey.

(c) That your petitioner contended that the instruction of the court as cited heretofore that the possession of such liquor was in violation of the law, violated Article 1, Section 8, Clause 3 of the United States Constitution relative to the control of Interstate Commerce between states of the United States.

(d) That your petitioner now contends that the refusal of the Supreme Court of North Carolina to entertain his appeal from a conviction of an alleged crime when neither the bill of indictment charged a crime, nor the evidence adduced by the state established a crime that the same was in violation of the Due Process Clause.

(e) Your petitioner further contends that the sentence of eighteen months on the first count suspended upon payment of $500.00 fine and good behavior for three years, and eighteen months servitude on the second count suspended upon good behavior for three years was a cruel and unjust punishment of the defendant when no crime was either charged or proven and that the same was, therefore, in violation of Amendment 8 of the United States Constitution (See Apendix 4, Page 16).

Your petitioner further shows that the Supreme Court of North Carolina purportedly refused to entertain an appeal for the reason that his assignments of error were not numbered, but the petitioner respectfully calls the Court's attention to the assignments of error set out on page 21 through 27 inclusive; that another reason that the court gave was that the brief filed by your petitioner did not contain a statement of facts. It is respectfully submitted that the following statement of facts was included

in the brief filed by your petitioner in the Supreme Court of North Carolina:

"The defendant, Dave Dover, was indicted originally before D. B. Price, a Justice of the Peace, for having in his possession a quantity of tax paid whiskey allegedly for the purpose of sale. Upon defendant's being bound to the Superior Court, a bill of indictment was returned by the Grand Jury containing two counts, to wit, possession of intoxicating liquors for the purpose of sale, and merely possession of liquors (R. P. 6). The only evidence offered in the case was that by the State, through the witness R. J. Stroupe, who testified that he saw the defendant drive up to the 400 Club, and that after the defendant got out of the Ford Coach which he was driving, the officers found a bag of whiskey containing eight half-pint bottles of Seagram's Seven Crown Whiskey, and eight half-pint bottles of Calvert's Reserve. There was no North Carolina revenue stamp or ABC stamp on the whiskey, but that it did have the Federal tax stamp affixed thereto, and that the seal was unbroken on each bottle; that he did not find more than one gallon of whiskey. There was no evidence on the question of defendant having the whiskey for the purpose of sale."

Your petitioner respectfully submits that the questions herein sought to be considered were duly raised upon his motion for judgment as of non suit in the trial court, which motion was in accordance with North Carolina practice and procedure, made orally and no record thereof was made or is available; that your petitioner respectfully submits that he has exhausted his remedies in the state courts and that his only means of redress is to petition the judicial branch of the United States Government, to-wit, this Honorable Court for relief from his present

plight, and your petitioner in good faith believes that under Amendment 1 of the United States Constitution (Appendix 5, Page 16) that he has the right to so petition for a redress of his grievances.

Wherefore, your petitioner respectfully prays this Honorable Court that his petition for writ of certiorari be granted to the end in view that it may be determined whether your petitioner was charged with the crime, or whether the evidence established a crime either under the Federal Laws or the laws of North Carolina, and your petitioner will ever pray such relief.

Respectfully submitted,

W. H. Strickland,
Lenoir, North Carolina,
Henry B. Huff,
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Jurisdiction

The Supreme Court of the United States has jurisdiction to hear this case because due process of law was denied your petitioner by the court of original jurisdiction, and the Supreme Court of North Carolina refusing to entertain the appeal, continued to deny due process of law to your petitioner; that this court has jurisdiction to hear said case for the reasons hereinafter set out.

At the outset it is stated as a fact that there is no North Carolina Statute creating a crime out of the facts involved in this case. The Court and the Solicitor stated that they were proceeding under General Statutes 18-2 (Appendix 8), which Act is commonly known in North Carolina as the Turlington Act, and was passed by the Legislature in 1923.

In 1937 the Legislature passed what is properly known as the Alcoholic Beverage Control Act, which is Chapter 49 of the Public Laws of North Carolina of 1937. This Act in Section 27 thereof provides as follows: "That chapters four hundred eighteen and four hundred ninety-three of the Public Laws of one thousand nine hundred thirty-five be and the same are hereby repealed, except as referred to in this Act, and all other laws and clauses of laws in conflict herewith to the extent of such conflict are hereby repealed."

The Supreme Court of North Carolina was first confronted with the conflict between the two Acts in *State* v. *Suddreth,* 223 N. C. 610; 27 S. E. 2nd 623. In that case the defendant Suddreth had in his possession federally tax paid whiskey in the amount of six pints. The court held that in the absence of positive proof that he had the whiskey for sale, he had not committed any crime; "That

the Turlington Act of 1923 and Chapter 49, Public Laws of 1937 is in irreconcilable conflict, and to such extent as they are in conflict the Turlington Act is repealed by the 1937 Act. The Court further said to accept any other further construction is to attribute to the legislature the intention to make it lawful for a person to purchase, transport and possess in his home for the purposes mentioned, not more than one gallon of intoxicating liquors or alcoholic beverages, and, at the same time, to make the possession of it evidence of his guilt of a criminal offense for which, upon charges being preferred, he may be convicted by a jury and subjected to punishment therefor. We cannot assume that the legislature had any such inconsistent and conflicting intentions. It is not ours to make the law. That is legislative. It is ours to interpret the law as the legislature enacts it.

State v. *Suddreth* has been reaffirmed since the date of its decision to the present time. As to the petitioner's contention that the trial court having proceeded upon a void bill of indictment which charged no crime under North Carolina law, and the evidence did not establish any crime under North Carolina law was a violation of the Due Process Clause. The applicable Statute at the present time in North Carolina is General Statutes 18-50, which provides as follows: "The possession for sale, or sales, of illicit liquors, or the sale of any liquors purchased from the county stores, is hereby prohibited and a violation of this section shall constitute a crime and shall be punishable by fine or imprisonment, or both, in the discretion of the court." And in construing this Statute in *State* v. *Lockey,* 214 N. C. 525; 199 S. E. 715, the Court held, "The fact of possession does not constitute prima facie evidence that the possession was for the purpose of sale, since the Statute under which the warrant is drawn

does not provide for such prima facie rule." Then this Court has held in *Thornhill* v. *State of Alabama*, 310 U. S. 88 that a conviction upon a charge not made out would be a denial of due process. In Corpus Juris Secundum constitutional law, Section 587, it is stated that there must be a law creating the offense; that the bill of indictment must set out the Acts which constitute the offense with reasonable certainty. In *Chicago Railroad Company* v. *Chicago*, 166 U. S. 234, this Court held, "A state may not, by any of its agencies, disregard the prohibitions of the amendment. Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts, and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with the amendment. In determining what is due process of law, regard must be had to substance not to form." Then in *Dutiel* v. *State*, 284 N. W. 321 at 325, the court held that, "Due process of law in a criminal case requires a law creating or defining the offense, court of competent jurisdiction, accusation in due form, notice and opportunity to answer charges, trial according to settled course of judicial proceeding, and right to be discharged unless found guilty." Meaning when the above requirements have been met. Then in *J. O. Plott Company* v. *H. K. Ferguson Company*, 163 S. E. 688 at 691, the North Carolina court held that, "due process meant the general and public law operating equally on all persons in like circumstances."

The North Carolina Court has already held in *State* v. *Suddreth, Supra*, that the possession of whiskey bearing the Federal tax stamp not in excess of one gallon is not a violation of any North Carolina law, yet the trial court disregarded that and subsequent decisions upon the same question and instructed the jury that any quantity of

whiskey in Gaston County, North Carolina was a violation of the law, and this cause not being founded upon a valid charge and not being supported by valid evidence establishing a crime, constitutes a violation of the due process clause, and when the Supreme Court of North Carolina arbitrarily and capriciously declined to entertain your petitioner's appeal, it likewise violated the due process clause in condemning a man to penal servitude when he had committed no violation of any law of the State of North Carolina. In *Elkern* v. *McGowern,* 142 N. W. 595 at Page 619, the Court held that due process is law according to the principles of natural justice by the rulings of the common law. In Corpus Juris Secundum Constitutional Law, Section 589, it is said that man must not be convicted until the State has made out its case and removed the presumption of innocence by evidence establishing guilt beyond a reasonable doubt.

Certainly, the American Courts have not become so communized that a man may be imprisoned when he has committed no crime under the law of the land as your petitioner is confronted with in the case at bar. In *Pinson* v. *City of Birmingham,* 136 Southern 868, the Court held that due process is denied unless substantive facts necessary to constitute an offense are alleged. In the case at bar the bill of indictment did not allege the quantity of whiskey the defendant possessed, and the evidence revealed possession of only one gallon, which is entirely legal under both national and State of North Carolina laws. Notwithstanding that fact, the trial court virtually instructed the jury to return a verdict of guilty, and the Supreme Court declined to entertain an appeal. Certainly, whenever a citizen is legally entitled to possess a certain quantity of whiskey then in order to be valid the bill of indictment should charge that he possessed a quan-

tity in excess of the legal amount. AS TO THE QUESTION OF WHETHER DENIAL OF AN APPEAL WAS DENIAL OF DUE PROCESS, the courts have held in *Bryant* v. *Akron Metropolitan Park District,* 281 U. S. 74 (74 Lawyers Edition 710) that while an appeal is not necessary to due process in the ordinary case, it is necessary if due process has been denied in the tribunal of first instance. In this case your petitioner was denied due process in the tribunal of first instance, in that, the bill of indictment did not charge that he possessed a quantity of whiskey in excess of one gallon. The evidence showed that he possessed only one gallon, therefore, the denial of his appeal was a denial of due process; that your petitioner was denied due process for the reason that under Amendment 21 of the United States Constitution (See Appendix 3), and under Article 1, Section 8, Clause 3 (Appendix 6) that he was entitled to have the quantity of whiskey in his possession under the Interstate Commerce Clause. The fact that intoxicating liquor is Interstate Commerce is established by *Hayes* v. *Oklahoma,* 112 Federal 2nd 417 (U. S. Circuit Court of Appeals), wherein the court held that although this amendment renders to each state the power to prohibit or condition importations of intoxicating liquor in interstate commerce into the state, it does not surrender power of congress to prohibit or regulate transportation of intoxicating liquor in interstate commerce, and congress has power to enact and penalize its violation. In the case at bar we have North Carolina establishing a method of regulation by Chapter 49 of the Public Laws of 1937, and your petitioner was within the provisions of that Act, and yet, the trial court disregarded the interstate commerce clause and instructed the jury that the defendant was guilty and the Supreme Court declined to hear an appeal.

In *Washington Brewers Institute* v. *U. S.*, 137 Federal 2nd 964, it was held that under this amendment, the states have practically unlimited power to regulate or prohibit the importation of alcoholic beverages irrespective of the commerce or the equal protection clauses, *but interstate commerce in liquor not in violation of state laws is left a matter of national concern.* A matter of equally as great a national concern is the imprisonment of citizens of the United States for a crime neither committed or charged, and which does not in fact exist.

Under Amendment 1, United States Constitution (Appendix 5) citizens of the United States are granted the right to petition the government for a redress of grievances. If a petitioner ever had a grievance the one at bar does for the reason that he is subject to thirty-six months' penal servitude by reason of conviction of something which is not a violation of any statutory or common law in the State of North Carolina. Certainly good conscience and justice at the hands of his government is available to your petitioner to correct the wrong which has been imposed upon him.

Your petitioner further contends that under Amendment 8 of the Constitution (Appendix 4) that the punishment imposed is cruel, excessive and unjustified for the reason that he committed no crime. The petitioner concedes that when a state court has imposed a sentence within the statutory limitations that the same does not constitute cruel or excessive punishment. Your petitioner also contends that he had violated no law and that the North Carolina courts have so held, and still he is faced with penal servitude of thirty-six months.

As to the assigned reasons for the failure of the Supreme Court to hear your petitioner's appeal, if that were true, which they were not as is evidenced by the certified record

transmitted herewith, your petitioner was still entitled to a hearing. In *Hicks* v. *Kenan,* 139 N. C. 337, it is held that Rule 27 then "now 21," or Section 550 of the Code "now G. S. 1-282" required that assignment of error relied on to be tabulated and inserted in the case on appeal or record, preferably at the end. That is what was done in the case at bar and they appear of record; and in *Queen* v. *Railroad Company,* 161 N. C. 217, it was held that it is necessary that the trial judge settle the case on appeal when the parties do not agree.

As seen from the authorities cited hereinbefore, if there is no objections by the appellee to the record served upon him within the time allowed, that that record becomes the case on appeal. The same case holds that the judgment rendered is of itself an assignment of error, and the case on appeal or motion *will not be dismissed on the grounds that no error was therein assigned.* Obviously, this ruling entitles the appellant to a decision of his appeal on the merits. In *Texas Company* v. *Fuel Company,* 199 N. C. 495, Conner, J., held that where the appellant's statement of his case on appeal is sent to this court as a part of the transcript of record, duly certified by the Clerk of the Superior Court, and it appears that said statement of case on appeal was duly served on appellee within the time prescribed by Statute, or allowed by the Judge, and it further appears that no exceptions or countercase was served by the appellee on the appellant, it stands as the case on appeal and a motion to dismiss will be denied.

General Statutes 1-282 with respect to appellate procedure is as follows: "The appellant shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the request of the counsel of the parties for instructions if there be an exception on account of the granting

or withholding thereof, and stating separately, in articles numbered, the errors alleged. A copy of this statement shall be served on the respondent within fifteen days from the entry of the appeal taken; *within ten days after such service the respondent shall return the copy with his approval or specific amendments indorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved: Provided, that the judge trying the case shall have the power, in the exercise of his discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counter statement of case.''* In the case at bar the Solicitor for the State disregarded the provisions of this Statute and considered the case to be certified as it appears and without notice to opposing counsel or any settlement of the case on appeal by the Judge, the Supreme Court of North Carolina disregarded the requirements of this Statute in a further attempt to unjustly imprison your petitioner upon an alleged crime which does not exist.

Conclusion

In the firm belief that your petitioner can get justice somewhere and be relieved from serving a long prison term merely for the possession of one gallon of tax paid whiskey, which he was authorized to have under all of the laws of the State of North Carolina and the Nation, it is respectfully prayed that a petition of certiorari be granted to the Supreme Court of North Carolina.

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APPENDIX 1

Amendment 5 of the United States Constitution: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, *nor be deprived of life, liberty, or property, without due process of law;* nor shall private property be taken for public use, without just compensation."

APPENDIX 2

Amendment 14, Section 1, United States Constitution: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.*

APPENDIX 3

Amendment 21, United States Constitution: "1. The eighteenth article of amendment to the constitution of the United States is hereby repealed. 2. The transportation or importation into any state, territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by conventions in the several states, as provided in the constitution, within seven

years from the date of the submission hereof to the states by the congress."

APPENDIX 4

Amendment 8, United States Constitution: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

APPENDIX 5

Amendment 1, United States Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

APPENDIX 6

United States Constitution, Article 1, Section 8, Clause 3: "The congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

APPENDIX 7

Section 1, Public Laws of North Carolina, 1937, Chapter 49: "The purpose and intent of this article is to establish a system of control of the sale of certain alcoholic beverages in North Carolina, and to provide the administrative features of the same, in such a manner as to insure, as far as possible, the proper administration of the sale of certain alcoholic beverages under a uniform system throughout the state."

Chapter 49, Public Laws of North Carolina, 1937, Section 13: "It shall be unlawful for any firm, person or corporation

to have in his or its possession any alcoholic beverages as defined herein upon which the taxes imposed by the laws of congress of the United States *or* by the laws of this state, have not been paid and any person convicted of the violation of this section shall be guilty of a misdemeanor and fined or imprisoned in the discretion of the court and the alcoholic beverage shall be seized and forfeited, together with any vehicle, vessel, aeroplane or other equipment used in the transportation and to carry the said alcoholic beverages, and the procedure pointed out in Section 18-6 for the seizure, arrest, confiscation and sale of such vehicle, vessel, aeroplane or other means of transportation shall be used and the provisions of said Section 18-6 are hereby declared to be in full force and effect in any of the counties of the state which shall operate under the provisions of this article, *and the possession of such alcoholic beverages in a container which does not bear either a revenue stamp of the federal government or a stamp of any of the county boards of the state of North Carolina shall constitute prima facie evidence of the violation of this section.*"

Chapter 49, Public Laws of North Carolina, 1937, Section 14: "It shall not be unlawful for any person to transport a quantity of alcoholic beverages not in excess of one gallon from a county in North Carolina coming under the provisions of this article: Provided, said alcoholic beverages are not being transported for the purposes of sale, and provided further that the cap or seal on the container or containers of said alcoholic beverages has not been opened or broken. Nothing contained in this article shall be construed to prevent the transportation through any county not coming under the provisions of this article, of alcoholic beverages in actual course of delivery to any alcoholic beverage control board established in any county coming under the provisions of this article."

Chapter 49, Public Laws of North Carolina, 1937, Section 22: "It shall be unlawful for any person, firm, or corporation, to purchase in, or to bring in this State, any alcoholic beverage from any source, except from a county store operated in accordance with this Act, *except a person may purchase legally outside of this State and bring into the same*

for his own personal use not more than one gallon of such alcoholic beverage. A violation of this section shall constitute a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court."

APPENDIX 8

General Statutes 18-2: "No person shall manufacture, sell, barter, transport, import, export, deliver, furnish, purchase, or possess any intoxicating liquor except as authorized in this article; and all the provisions of this article shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented. Liquor for non-beverage purposes and wine for sacramental purposes may be manufactured, purchased, sold, bartered, transported, imported, exported, delivered, furnished, and possessed, but only as provided by Title II of "The Volstead Act," act of congress enacted October twenty-eighth, one thousand nine hundred and nineteen, an act supplemental to the National Prohibition Act, "H. R. 7294," an act of congress approved November twenty-third, one thousand nine hundred and twenty-one."